Nos. 16-285, 16-300 and 16-307

RECORD AND BRIEF

Supreme Court, U.S.
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In The
Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,
v.
JACOB LEWIS,
Respondent.

ERNST & YOUNG LLP, *et al.*,
Petitioners,
v.
STEPHEN MORRIS, *et al.*,
Respondents.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
MURPHY OIL USA, INC., *et al.*,
Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Seventh, Ninth, And Fifth Circuits

BRIEF OF *AMICUS CURIAE* NATIONAL ACADEMY OF ARBITRATORS IN SUPPORT OF RESPONDENTS

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INTEREST AND CONCERN OF THE *AMICUS*[1]

The National Academy of Arbitrators was founded in 1947 "to foster the highest standards of integrity, competence, honor and character among those engaged in the arbitration of industrial disputes on a professional basis," to adopt and secure adherence to canons of professional ethics, and to promote the study and understanding of the arbitration of industrial disputes. Gladys Gruenberg, Joyce Najita & Dennis Nolan, THE NATIONAL ACADEMY OF ARBITRATORS: FIFTY YEARS IN THE WORLD OF WORK 26 (1997). As the historians of the Academy observe, the Academy has been "a primary force in shaping American labor arbitration." *Id.*

The Academy's rules assure that only the most experienced, ethical, and well-respected arbitrators are elected to membership. Scholars who have made significant contributions to the understanding of labor law and labor relations may also be elected. Such is the Academy's concern for strict neutrality that its members are prohibited from serving as advocates or consultants in labor relations, from being associated with firms that perform those functions, and even from serving as expert witnesses on behalf of labor or management. Currently, the Academy has approximately 600 U.S. and Canadian members.

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[1] Rule 37.6 statement: Counsel of record is the sole author of this brief. No person or entity other than the **National Academy of Arbitrators** has made any monetary contribution to the preparation or submission of this brief. Letters reflecting the consent of the parties to the filing of this brief have been filed with the Clerk.

In keeping with its educational mission, the Academy has appeared before this Court as *amicus curiae* in cases concerning the law of arbitration under collective agreements, *i.e.*, labor arbitration, *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986) and *Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57 (2000), in cases concerning the arbitration of individual statutory claims, *i.e.*, employment arbitration, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998), and, in *14 Penn Plaza, LLC v. Pyett*, 556 U.S. 247 (2009), where the two might conflate.

The Academy's interest here is twofold. The first derives from its foundational concern for the fairness of the arbitral process with special concern when arbitration is compelled by an employer policy or contract. The Academy was a prime mover in what was to become the 1995 multi-party Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship. The Academy's *Policy Statement on Employment Arbitration* (May 20, 2009), deals specifically with arbitration policies that preclude the presentation of collective claims.

The second draws from a deep experiential well. Academy members have long engaged in arbitrating claims involving the contractual and statutory rights of groups of workers and their employers under collective bargaining agreements. The Academy respectfully submits that experience usefully informs the issues

before the Court; that the Court would meaningfully benefit from an understanding of how these collective claims are arbitrated – swiftly, informally, and simply.

SUMMARY OF ARGUMENT

The prohibition of joint or group collective arbitration is defended on the theory that the presentation of a common claim in concert would sacrifice the benefits of simplicity, flexibility, informality, and expedition that theoretically inhere only in bilateral arbitration. The theory is refuted by the facts.

Amicus National Academy of Arbitrators will show that collective employment arbitration presents no prospect of the "procedural morass" that concerned the Court in the application of Rule 23 FRCP to consumer arbitration. Sections I and II, *infra*. Drawing on its seventy years of experience in labor arbitration, *amicus* will show that collective statutory claims presented in employment arbitration can be heard as simply, flexibly, informally, and expeditiously as these very same claims are commonly heard in labor arbitration, Section III, *infra*; and, that an employer's policy prohibiting employees from pursuing common complaints together would result in the bringing of numerous repetitive individual claims, if they were all to seek redress. The presentation of all these individual claims, *would* produce a genuine "procedural morass." Section IV, *infra*. Thus, the premise of employer policies prohibiting individual workers from joining one

another in pursuing a common claim rests on the assumption that a multiplicity of individual claims would not actually be submitted. When employees are forbidden to join together and are most unlikely to proceed individually employers will rarely be called to account, leaving a gap in the realization of basic employment protections.

ARGUMENT

I. A Collective or "Class" Arbitration is Not a Rule 23 Class Action

The employer policies at issue do far more than prohibit employees from bringing or participating in a Rule 23 class action – in court or in arbitration. These policies deny employees the right to exercise any concerted legal action: two employees who claim to have suffered a common wrong – have been required to endure the same sexual harassment, have suffered the same age-discriminatory lay-off, or have been denied the same donning and doffing overtime pay – are prohibited from bringing their claims together. They can be heard; but only as individuals. The legal justification for this prohibition rests on a misperceived connection between Rule 23 class actions and collective arbitrations.

In *AT&T Mobility v. Concepcion*, 563 U.S. 333 (2011), the Court determined that a company's preclusion of class arbitration in its consumer sales agreement was an acceptable trade-off in order to retain the

promise of swiftness, informality, and flexibility held by bilateral arbitration:

> [T]he switch from bilateral to class arbitration sacrifices the principal advantage of arbitration – its informality – and makes the process slower, more costly, and more likely to generate procedural morass than final judgment. . . .
>
> But before an arbitrator may decide the merits of a claim in classwide procedures, he must first decide, for example, whether the class itself may be certified, whether the named parties are sufficiently representative and typical, and how discovery for the class should be conducted.

563 U.S. at 348, referring to the elements of class action certification under Rule 23 FRCP. The Court reiterated this consideration in *American Express Co. v. Italian Colors Restaurant*, ___ U.S. ___, 133 S. Ct. 2304, 2310 (2013).

However, neither *D.R. Horton* nor *Murphy Oil* involved consumer claims, nor were the claimants in those cases, who were asserting claims under the Fair Labor Standards Act (FLSA), seeking to have an arbitrator apply Rule 23. In *D.R. Horton*, the employees' lawyer wrote first to inform the employer that he was seeking to arbitrate on behalf of two named employees, then five other named employees and other "similarly situated," all of whom occupied a job category allegedly

misclassified by the employer under the FLSA.[2] In *Murphy Oil*, the employee had commenced a collective action under 29 U.S.C. § 216(b) alleging overtime violations under the FLSA.[3] Nevertheless, the Fifth Circuit applied the Court's Rule 23 reasoning in *Concepcion*:

> [A]s *Concepcion* makes clear, certain procedures are *a practical necessity* in class arbitration . . . (listing adequate representation of absent class members, notice, opportunity to be heard, and right to opt-out). Those procedures are also part of class actions in court. As *Concepcion* held as to classwide arbitration, requiring the availability of class actions "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."

D.R. Horton v. NLRB, 737 F.3d 344, 359-60 (5th Cir. 2013). In *Murphy Oil*, the Fifth Circuit adhered to its prior ruling, 808 F.3d 1013, 1015 (5th Cir. 2015). Not to put too fine a point on it, the proposition that Rule 23-like procedures are a "practical necessity" in group or other multi-claimant employment arbitration is counter-factual. The proposition is negated by the practice of labor arbitration over many decades.

Rule 23's requirements are exacting, driven in part out of concern for the binding effect of a judgment

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[2] *D.R. Horton*, 357 NLRB 2277, 2291 (2012) (facts recited in the decision of the Administrative Law Judge).

[3] *Murphy Oil USA, Inc.*, 361 NLRB No. 72 at p. 3 (2014) (slip opinion).

on absent class members. That concern does not apply when the employees' collective claims are not presented in the framework of Rule 23. Speaking of collective actions under § 216(b) of the FLSA, for example, this Court has noted that "Rule 23 actions are *fundamentally* different from collective actions" under that Act. *Genesis Healthcare Corp. v. Symczk*, ___ U.S. ___, 133 S. Ct. 1523, 1529 (2013) (emphasis added). Under § 216(b), there is no exacting determination of numerosity, typicality, or representational adequacy, and the situation of the named claimants need only be "similar" in order for them to be notified and invited to be represented. Only those who choose to opt in and become named plaintiffs are bound by the judgment, subject to a judicial determination of their conformity to § 216(b)'s requirements of similar situation. *See generally*, 7B Fed. Prac. & Pro. Civ. § 1807 (3d ed. 2016) ("Collective Actions Under the Fair Labor Standards Act"). If greater flexibility and informality distinguishes a § 216(b) "collective action" from a Rule 23 class action – and it does – a collective arbitration, to which the procedure of "class certification" does not apply, affords simplicity, informality and flexibility *a fortiori*. Section III, *infra*.

The paradigmatic example is of collective claims asserted in labor arbitration. Unions routinely bring "class grievances" before arbitrators on behalf of employees covered by the collective bargaining agreement: claims of departure from the agreement as well as legal claims incorporated into the agreement. Section II, *infra*. These claimants are joined together by

their shared claim of a common contractual or legal wrong. Such is the very stuff of "class" arbitration, day in and day out in the labor union context and has been for over a century.

Thus, the concern that the complexity of class action litigation, when transferred into the employment arbitration, will swamp the informality and flexibility that arbitration promises is misplaced in cases when no such transfer is involved. In *14 Penn Plaza, LLC v. Pyett*, 556 U.S. 247 (2009), this Court, building on the body of law the Court has fashioned to govern labor arbitration – *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960), *United Steelworkers v. Enterprise Wheel Car Corp.*, 363 U.S. 593 (1960), *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643 (1986), *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190 (1991) – emphasized that the "simplicity, informality, and expedition of [labor] arbitration" applied to the plaintiffs' claim. 556 U.S. at 269. Yet all these cases involved group claims that were or could be asserted collectively in arbitration.[4] Importantly, *14 Penn Plaza* itself concerned an alleged act of statutory age discrimination suffered by three employees in common

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[4] Where, for example, a group claim of violation of wage and hour or wage payment law requires an interpretation of the provisions of a collective bargaining agreement, the group's judicial action is pre-empted by § 301 of the Labor Act: the claim thus proceeds into labor arbitration as a group or class claim in which the statutory issue will be resolved. *E.g.*, *Rueli v. Bayside Health, Inc.*, 835 F.3d 53, 64 (1st Cir. 2016); *Barton v. House of Raeford Farms, Inc.*, 745 F.3d 95, 106 (4th Cir. 2014).

whose grievances were presented jointly by their union.[5] The Court held that their collective claim should be heard in labor arbitration.

The question then is not whether Rule 23's exacting formalities must obtain in an employment arbitration as a "practical necessity" – for they do not – but whether collective claims can be heard in employment arbitration without entering a "procedural morass" of the kind the Court adverted to in *Concepcion*. The experience of labor arbitration speaks volumes to this question. Section II, *infra*.

II. Collective or "Class" Claims are Common Fare in Labor Arbitration Without Any Loss of Simplicity, Flexibility, Expedition, or Informality

Attention turns first to the regulatory character of the collective bargaining agreement. The collective agreement is more than a memorialization of a promissory exchange. It is a "generalized code." *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578 (1960). In applying the agreement's text, labor arbitrators draw on industrial practice, on the "common law of the shop," and on external law – either as expressly incorporated into it, as in *14 Penn Plaza, LLC v. Pyett*, *supra*, or as the law informs the text, as,

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[5] First Amended Complaint ¶¶ 38-39 *in Pyett v. Pennsylvania Bldg. Co.*, No. 04CV07536 (NRB) (Nov. 1, 2004).

today, it often does.[6] It is a longstanding maxim that for the parties to the collective agreement, it is "the law." Neil Chamberlain & James Kuhn, COLLECTIVE BARGAINING 121-30 (2d ed. 1965) (*"The Governmental Concept and the Agreement as Law"*).

The Employer's adherence to the agreement is assured through the Union's use of the grievance-arbitration procedure. All employees covered by the agreement are represented by the Union. The Employer's obligation to co-operate in the grievance procedure is assured by section 8(a)(5) of the National Labor Relations Act; the Employer's "duty to bargain" extends to "any question arising" under the collective agreement. 29 U.S.C. § 158(d).

Consequently, to allow the Union to evaluate whether a grievance should be filed and pursued to arbitration the Employer must provide the Union, at its request, with all non-confidential information in its possession that is relevant to the Union's decision. *See generally*, Robert Gorman & Matthew Finkin, LABOR LAW: ANALYSIS AND ADVOCACY § 20.4 (2013). The request must be honored even in advance of any formal grievance. If a request is denied it can be pursued to the National Labor Relations Board as an unfair labor practice. Though resort to the arbitrator to secure that information is available, such resort is not required. *NLRB v. Acme Indus. Co.*, 385 U.S. 432 (1967). As

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[6] Martin Malin, *Revisiting the Meltzer-Howlett Debate on External Public Law in Arbitration: Is it Time for the Courts to Declare Howlett the Winner?*, 24 The Labor Lawyer 1 (2008).

the Court explained, considering a demand for information about the possible wrongful transfer or lay-off of a number of employees, the duty to disclose under the Act is subject to a "discovery-type" standard." *Id.* at 437. The leading one-volume treatise summarizes the law thusly,

> The employer clearly must furnish information as to wage rates and classifications, merit pay increases, the costs of a welfare benefit plan . . . information regarding overtime hours worked by unit employees, their marital status, surveys and studies relating to wages or other working conditions, company practices regarding probationary employees, layoffs resulting from subcontracting, and seniority lists [and a good deal more].

Robert Gorman & Matthew Finkin, LABOR LAW: ANALYSIS AND ADVOCACY, *supra* § 20.5 at p. 651 (references omitted).

This aspect of the grievance-arbitration process in the unionized workplace is relevant here for two reasons. First, though the scope and process of disclosure may be broad, it has not proven to be burdensome in practice. *See* § 20.4 **Advocate Practice Point** *in* Gorman & Finkin, *id.* at pp. 649-50. For the most part, informational disclosure functions as a well-accepted part of the system of grievance processing and arbitration. *Id.*

Second, when the information reveals managerial action arguably violative of the labor contract that could affect a number of employees, possibly quite a

large number, the Union's response can be, in labor parlance, a "class grievance"; that is, a grievance claiming that a group of workers has suffered in common a violation of a contract term or of a legal protection – including a statutory protection – incorporated in the agreement. Such collective claims are frequently presented and heard. As a basic text on labor arbitration put it,

> An arbitrator may appropriately grant class relief when the grievance is filed by the union as representative of a group of similarly situated employees, or the grievance is clearly intended to apply to all employees in a group.

THE COMMON LAW OF THE WORKPLACE: THE VIEWS OF ARBITRATORS § 10.30 (Theodore St. Antoine, ed., 2d ed 2005) (blackletter in original). The rationale for hearing these claims is simple:

> By joining multiple complaints into one grievance, identical or similar issues can be decided in one hearing, thus permitting the expeditious, efficient, and inexpensive handling of the matter in dispute.

Id. at 395-96.

It bears emphasis that a "class" labor arbitration is not a Rule 23 class action, subject to exacting preconditions, nor is it akin to a § 216(b) collective action subject to a less exacting certification procedure. A "class" labor arbitration entails the Union's assertion of a common violation – of contract or law – which, if the union satisfies its burden of proof before the arbitrator that such a violation has occurred, proceeds to

the identification of those suffering the common wrong and the award of an appropriate remedy.[7]

An abbreviated review of recent awards reveals not only how common such class claims are, as a staple of labor arbitration, but also how the issues presented in that forum echo or replicate labor protective legislation; for example, the FLSA and cognate state wage payment law. To mention just a few: a "class grievance on behalf of all affected employees" that paychecks were not issued to the workforce on a weekly basis, *Allied Waste, Inc.*, 2005 LA Supp. 111592 (Goldberg, Arb. 2005); a "class action for all employees regarding the nonpayment of extra driving time from an employee's home to the Company's branch office," *ADT, LLC*, 133 LA 1821 (Felice, Arb. 2014); a "class action on behalf of 'all affected employees'" for payment for check-in/check-out time, *First Student, Inc.*, 131 LA 736 (Landau, Arb. 2013); and, even a "class grievance" over the Employer's failure to distribute pay stubs to the work force by U.S. mail, *Caterpillar Inc.*, 126 LA 554 (Goldstein, Arb. 2009).

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[7] In some cases the parties agree to bifurcate the hearing: the arbitrator is asked first to decide the question of liability; and, if the finding is affirmative, a second phase determines the remedy or remedies. *E.g.*, *New York State Nurses Ass'n*, 2014 LA Supp. 165894 (Douglas, Arb. 2014) (overtime pay dispute). More often, after finding a violation the arbitrator simply retains jurisdiction if the parties fail to agree on the remedies. *E.g.*, *Village of Matteson*, 2015 LA Supp. 200579 (Bierig, Arb. 2015) (compensation for emergency closures); *Lockheed Martin Aeronautics, Co.*, 2002 LA Supp. 109843 (Abrams, Arb. 2002) (back pay for misassigned work).

Note also the steady drumbeat of class claims for unpaid overtime that have been efficiently resolved in labor arbitration affecting the rights of large numbers of workers: *Hanson Aggregates Midwest, Inc.*, 2003 LA Supp. 110236 (Skulina, Arb. 2003) ("The grievance is a class grievance for" workers on the third shift); *GAF Materials Corp.*, 2004 LA Supp. 101044 (Sargent, Arb. 2004) ("a class grievance on behalf of all employees affected by the overtime violation"); *Green Specialty Care Center*, 126 LA 1517 (Dean, Arb. 2009) ("this class action grievance" on availability of overtime); *Cascade Steel Rolling Mills, Inc.*, 2003 LA Supp. 110598 (Lumbley, Arb. 2003) (a "class action grievance" on entitlement to overtime pay) – as well as for vacation and holiday pay; *United Parcel Service, Inc.*, 2003 LA Supp. 110449 (Zobrak, Arb. 2003) ("Class Action"); *Interstate Brands Corp.*, 121 LA 1720 (Duda, Arb. 2005) ("Class Action grievance"); *Greektown Casino*, 120 LA 25 (Brodsky, Arb. 2004) ("class action grievance"); *Troy Laminating and Coating, Inc.*, 117 LA 115 (Duff, Arb. 2002) (a "class action grievance"); *Brechteen Co.*, 114 LA 967 (Brodsky, Arb. 2000) ("a class action grievance"); *et cetera*.

These awards are not referenced to suggest that wage and hour cases differ in any way from other statutory violations that may affect a group and that could be brought collectively in labor arbitration. Examples of employment discrimination claims and other public policies are equally common: the claim that a test for promotion has a disparate impact on women and minorities, *Toledo Edison Co.*, 105 LA 167 (Curry, Arb.

1995); that the disallowance of religious exemption from Sunday work violated Title VII of the Civil Rights Act, *Avis Rent-A-Car Sys.*, 107 LA 197 (Shanker, Arb. 1996); that the requirement of a commercial driver's license discriminated against older workers, *The Lion, Inc.*, 109 LA 19 (Kaplan, Arb. 1997). Wage and hour issues are used as illustrative here only because all the cases before the Court involve them.

Suffice it to say, collective workplace claims can be handled, as the Court said in *Pyett*, with the "simplicity, informality, and expedition" that is characteristic of labor arbitration. 556 U.S. at 269. Accordingly, when an experienced labor arbitrator confronted an employer's assertion that because *Concepcion* had established that "'arbitration is poorly suited to the higher stakes of class litigation,'" the arbitrator should not entertain a group FLSA pay claim, he dispatched it easily. In the arbitrator's view, *Concepcion* provides no "basis upon which a 'group of employees' portal dispute grievance . . . [can be] determined not to be arbitrable." *Federal Bureau of Prisons*, 135 LA 1215 (Heekin, Arb. 2015).

The arbitrator's judgment is beyond dispute. *Amicus* submits that the application of *Concepcion*'s rationale to the cases before the Court is negated by decades of experience.[8]

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[8] As the Ninth Circuit put it,

> Arbitration between groups of employees and their employers is commonplace in the labor context. It would

III. Collective Employment Arbitration is Indistinguishable From Collective Labor Arbitration in Terms of Informality, Simplicity, and Flexibility

The manner of dealing with collective claims under a collective bargaining agreement's arbitration provision and of collective claims under an employer arbitration policy is, for all practical purposes, comparable in terms of scope of discovery, nature of the evidence, control of the process by the arbitrator, authority to award statutory remedies, and the like. The only structural difference between the two is in the character of representation. Whether that difference is meaningful is taken up below. But first, a comparison of how the two systems operate can be displayed graphically.

> no doubt surprise many employers to learn that individual proceedings are a "fundamental" attribute of workplace arbitration.

Morris v. Ernst & Young, LLP, 834 F.3d 975, 989 (9th Cir. 2016) (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991), where the rules at issue allowed for group proceedings).

Collective Labor and Collective Employment Arbitration Compared

	Collective Labor Arbitration	Collective Employment Arbitration
Representation	Legal counsel or other representative of the union for it and any named claimants and all others who are determined by the arbitrator, after hearing, to have suffered the same wrong	Legal counsel or other representative for the named claimants[a] and all others who join them and are determined by the arbitrator, after hearing, to have suffered the same wrong
Discovery	All relevant information in the employer's possession including information regarding potential claimants[b]	Same[c]
Compliance with Demand	Unfair labor practice[d] or by arbitral subpoena[e]	Arbitral subpoena[f]

Presentation of Evidence	The proceeding is informal. Judicial rules of evidence need not be applied: the probative rule is merely one of relevance[g]	Same[h]
Remedy	All due by contract or law[i]	Same[j]

a. Am. Arb. Ass'n, Employment Arbitration Rules No. 19 (2009) ("Any party may be represented by counsel or other authorized representatives.").

b. *NLRB v. Acme Indus. Co.*, 385 U.S. 432 (1967); Gorman & Finkin, LABOR LAW, *supra* § 20.4 (reciting authority).

c. Am. Arb. Ass'n, Employment Arbitration Rules No. 9 (2009):

> The arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration.

d. *NLRB v. Acme Indus. Co.*, *supra*, *n.b.*

e. Am. Arb. Ass'n, Labor Arbitration Rules No. 27 (2013).

f. Am. Arb. Ass'n, Employment Arbitration Rules No. 30 (2009).

g. Am. Arb. Ass'n, Labor Arbitration Rules No. 27 (2013) ("The parties may offer such evidence as is relevant and material to the dispute, and shall produce such evidence as the arbitrator may deem necessary to an understanding and determination of the dispute.").

h. Am. Arb. Ass'n, Employment Arbitration Rules No. 30 (2009) ("The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator deems necessary to an understanding and determination of the dispute.").

i. THE COMMON LAW OF THE WORKPLACE, *supra*, §§ 10.1, 10.5. In labor arbitration, whether the award determines the issue for a future case is for the arbitrator in that case to decide. *W.R. Grace & Co. v. Local 750, Rubber Workers*, 461 U.S. 757 (1983). *See generally*, THE COMMON LAW OF THE WORKPLACE § 1.91, *supra*.

j. Am. Arb. Ass'n, Employment Arbitration Rules No. 39(d) (2013). In employment arbitration, the award binds those who have joined the action. Employees or former employees who have chosen not to join the group could not be bound by the award.

The question of whether the difference in representation – whether a union or employee group representative – affects the simplicity, informality, and flexibility of the process has two aspects; one obvious, the other hypothetical. First, the obvious. Because the Union is already the exclusive representative of all

employees governed by the collective agreement regardless of Union membership, the Union has already been authorized to represent all employees who are potentially affected by the alleged wrong. Commonly, their claim would be presented in arbitration by legal counsel of the Union's choosing. In the non-union setting, the group of employees would need to select a representative to present their common claim, presumably by legal counsel of their choosing. This distinction has no impact on the adjudicative process. In labor arbitration, the Union acts through its chosen legal representative. So, too, does the group in employment arbitration.

Given the liberality of discovery in both settings, the union's representative in unionized employment and the legal representative of the group in the non-unionized setting are entitled to the names and other relevant information of those potentially affected by the challenged policy or decision. In the unionized setting, this permits the identification of those who might have suffered the common wrong and whose claims can be advanced as part of the group. In the non-unionized setting, the representative can identify those who might have suffered the common wrong and who might care to join the group in making the common claim. (Those who choose not to join would not be party to the proceeding.) The procedure is no more burdensome to non-unionized employers than the Union's exercise of its right to the same information for the same purpose in the unionized setting.

Second, the hypothetical. Because the representative of the group in the non-unionized setting is not an exclusive representative of all employees who could be potential claimants, it is hypothetically possible that some similarly situated employees might choose to bring their claims in concert with other employees or even singly. Were that hypothetical to materialize the employer would face more than one, and, possibly, conflicting claims regarding the underlying conduct. However, conflicts can also arise in the unionized setting where different unions under different contracts might demand arbitration over the same claim, for example, to the assignment of contested work. In such cases, the courts, "utilizing creative contract construction, have directed all parties to undertake tripartite arbitration." Gorman & Finkin, *supra* § 13.3 at p. 446 (citing authority). *See also* Catherine Fisk, *Managing Multiple Employment Arbitration Cases with Class Action Waivers in* PROCEEDINGS OF THE SIXTY-EIGHTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 207, 210-12 (Katherine Thomson ed. 2016) (discussing Rule 6(e) of the JAMS Employment Arbitration Rules providing for the consolidation of claims; no parallel provision appears in the American Arbitration Association's Employment Arbitration Rules).

Suffice it to say, the hypothetical burden on an employer confronting two or more group claims over the same issue positively pales beside the prospect of a multiplicity of repetitive individual claims necessitated by the blanket prohibition of any collective arbitration whatsoever. This is taken up in Section IV, *infra*.

IV. The Preclusion of Collective Claims Invites the "Procedural Morass" of a Multiplicity of Repetitive Individual Claims

Under the policies at issue here two or more workers who have suffered a common legal wrong are prohibited from challenging that wrong in common. If they are to claim their legal due they are required do so only individually. Were that to occur, employers imposing such a prohibition on group challenges would face the prospect of a multiplicity of bilateral arbitrations, each subject separately to discovery of the same documents, depositions of the same managers, presentation of oral testimony on the same practice or decisions made by same people, subject to the same arguments as to events and to the credibility of testimony regarding them, no matter how cumulative or repetitive in the aggregate. Inexorably, this would be the case if each of these aggrieved employees were to pursue a claim. As no employee would be a party to any other employee's action, each would make his or her case afresh. Were a large number who claim to have suffered the same wrong to bring individual arbitrations – all workers of African descent or all women workers who have been denied promotion by an arguably discriminatory test, all older workers disqualified by a novel job requirement that arguably has a discriminatory impact on grounds of age, those of the company's employees allegedly denied donning and doffing or overtime pay – employers *would* face a procedural morass: line and human resource managers would be

required to devote weeks, perhaps months, to repetitive discovery and testimony in as many individual arbitrations as there are claimants.

The benefit for the efficiency of any dispute resolution system in allowing collective claims to be brought in a single proceeding is echoed in the reciprocal benefit to employers in the expeditious resolution of the issue. The FLSA is illustrative. The rationale for Congress' providing for a collective action under 29 U.S.C. § 216(b) was recently summarized by the Third Circuit, reiterating the continuing vitality of this Court's teaching of a quarter century ago:

> By permitting employees to proceed collectively, the FLSA provides employees the advantages of pooling resources and lowering individual costs so that those with relatively small claims may pursue relief where individual litigation might otherwise be cost-prohibitive. It also yields efficiencies for the judicial system through resolution in one proceeding of common issues arising from the same allegedly wrongful activity affecting numerous individuals. *See Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 170 [1989].

Halle v. West Penn Allegheny Health Sys., Inc., 842 F.3d 215, 223 (3d Cir. 2016). That efficiency manifestly benefits employers as well.

Because the efficiency of collective disposition for employers as well as employees and for the adjudicative process is so clear, the obvious next question cannot be ignored: Why would an employer preclude

collective arbitration? Empirical research sheds light on this question.

"Proponents of employment arbitration proclaim its accessibility, particularly for claimants unable to find representation in courts of law," a leading empirical study observes.[9] But, as it and another empirical study confirmed, "the idea that arbitration invites meager claims is hard to square with the [statistical] reality that few employees accept the invitation."[10] It is difficult, to put it mildly, for employees to secure legal representation for the low stakes forum of bilateral arbitration.[11] An employee who learns that her recorded time has been "shaved" by her supervisor's systematic manipulation of the company's electronic timekeeping system and who is restricted to a bilateral arbitration would be hard pressed to retain legal counsel and the forensic expertise required to prove that that was so.[12] She might also have a well-grounded fear of retaliation were she to complain – not necessarily

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[9] Alexander J.S. Colvin & Mark Gough, *Individual Employment Rights Arbitration in the United States: Actors and Outcomes*, 68 ILR Rev. 1010, 1037 (2015).

[10] David Horton & Andrea Chandrasekher, *Employment Arbitration After the Revolution*, 65 Depaul L. Rev. 457, 471 (2016).

[11] Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 Berk. J. Emp. & Lab. L. 71 (2014).

[12] Elizabeth Tippett, Charlotte Alexander & Zev Eigen, *When Timekeeping Software Undermines Compliance*, 19 Yale J. L. & Tech. 1, 23 (2017) ("Software that provides supervisors with unchecked discretion to edit employee time is problematic from a behavioral compliance standpoint because supervisors have a strong incentive to limit payroll costs by shaving employee time.").

the blunt instrument of dismissal, but the assignment of reduced or inconvenient hours, to more distasteful duties and the like. If, however, what had been done to the worker was the result of an employer practice affecting many of her co-workers, and if these co-workers can combine to present their claim in a single action they would be far more likely to be able to secure representation. Whence the allowance for those affected to pool their claims. *Hoffman-LaRoche Inc. v. Sperling*, *supra*.

Consequently, the logic of collective claim preclusion is necessarily this: Even though a collective disposition would be far more efficient and cost effective than a multiplicity of bilateral arbitrations, employers can benefit because of the predictively low likelihood that any significant number of separate claims would ever be brought.

To stay with wage and hour law for illustrative purposes, abundant research shows that often wage violation is not a one-off act of exploitation, but a business model. As a study of low wage workers in Chicago concluded, "With a low ratio of [labor] inspectors per establishment and minimal penalties for noncompliance, evading the law is not a covert competitive tactic in service industries – it's a basic, uncontested business practice on public display." Marc Doussard, DEGRADED WORK: THE STRUGGLE AT THE BOTTOM OF THE LABOR MARKET 233 (2013). For all too many employers,

the risk of wage theft is a risk worth taking.[13] Consequently, for those employers the risk of a multiplicity of repetitive individual arbitrations created by the prohibition of collective claims is also a risk worth taking, based on the practical difficulty for employees seeking counsel and the low likelihood of their being able to secure counsel for bilateral arbitrations over small sums.[14] In that way, the employer can systematically avoid legal accountability at large and avoid any redress at all in many individual instances.[15]

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[13] The documentation is substantial. The most recent and comprehensive study on a national basis is by David Cooper & Teresa Kroeger, Employers steal billions from workers' paychecks each year, Economic Policy Institute Report (May 10, 2017). Notable also are studies in major cities. Ruth Milkman, Ana Luz González & Peter Ikeler, *Wage and Hour Violations in Urban Labour Markets: A Comparison of Los Angeles, New York and Chicago*, 43 Indus. Rel. J. 378 (2012); Annette Bernhardt, Michael W. Spiller & Diana Polson, *All Work and No Pay: Violations of Employment and Labor Laws in Chicago, Los Angeles, and New York City*, 91 Soc. Forces 725, 737 (2013).

[14] In addition, the arbitral listing agency may require the employer to deposit in advance the estimated arbitrator's fee. If a large number of individual claims are presented, this may amount to a considerable sum, *e.g.*, between $500,000 and $1,000,000 were forty employees individually to pursue arbitration. Martin Malin, *The Employment Decisions of the Supreme Court 2012-13 Term*, 29 ABA J. Lab. & Emp. L. 203, 213-14 (2014) (discussing just such a case). Though the requirement might conduce toward the settlement of multiple cases, the very prospect of such amounts having to be paid up front evidences the employer's disbelief that numerous identical claims will ever be pursued.

[15] There is yet another way employers benefit from a prohibition on collective claims. Unlike judicial proceedings, arbitration is confidential. The obligation is set out in the rules of well-accepted arbitral selection agencies as well in *amicus* Academy's

With this in mind, in 2009, *amicus* National Academy of Arbitrators adopted a *Policy Statement on Employment Arbitration*. This statement assists arbitrators in deciding whether to accept appointment, explaining that "cases arising under an employer

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Guidelines for Standards of Professional Responsibility for Arbitrators in Mandatory Employment Arbitration § 2(c)(1) ("The arbitrator must treat all significant aspects of an arbitration proceeding as confidential unless all parties waive this requirement or applicable law permits or requires disclosure.").

Students of mandatory employment arbitration have noted that confidentiality is of benefit to employers as it allows the employer to argue each case afresh without having to deal with a prior award disadvantageous to it. Ariel Avgar, *et al.*, *Unions and ADR: The Relationship Between Labor Unions and Workplace Dispute Resolution in U.S. Corporations*, 28 Ohio St. J. Dispute Resol. 63, 89 (2013). This employer advantage takes on additional salience when it is joined with a prohibition on collective claims: confidentiality allows an employer to avoid harmful evidence introduced in one proceeding to be used in another presenting the same claim on the same facts. Catherine Fisk, *Managing Multiple Employment Arbitration Cases with Class Action Waivers*, *supra*. It is noteworthy that two of the employers before the Court have deemed it useful to address confidentiality specifically in their governing policies in addition to the general principle of confidentiality. **Epic Systems'** "Mutual Arbitration Agreement" provides that, "no decision by any arbitrator shall serve as precedent in other arbitrations except in a dispute between the same parties. . . ." 7th Cir. Case No. 15-2997, Doc. 12-2. **Ernst & Young's** "Common Ground Dispute Resolution Program" goes further:

> *All* aspects of Phase I [mediation] and Phase II [arbitration] including any award made, shall be confidential, except to the extent disclosure is required by law or applicable professional standards, or is necessary in a later proceeding between the parties.

9th Cir. Case No. 13-16599, Doc. Entry 12-3 (emphasis added).

promulgated arbitration plan require particular vigilance on the part of arbitrators to ensure procedural fairness *and* to protect the integrity and reputation of workplace arbitration." (Emphasis added.) Before accepting appointment, the arbitrator is advised to consider *inter alia*,

> Any restrictions on class or group actions to the extent these might hinder particular grievants in pursuing their claims, especially where the monetary amount of each individual claim is relatively small, *or* hinder the vindication of the public purpose served by the particular claim. [Emphasis added.]

As the emphasized conjunctive and disjunctive respectively make clear, the Academy's concern is not only for the arbitrator's ability to do justice in the individual case, but also whether his or her participation would lend legitimacy to a policy that, by precluding collective claims, hobbles the realization of workplace justice. In the Academy's experience, that likelihood cannot be disregarded.

CONCLUSION

Unlike *Concepcion* and *Italian Colors*, the cases before the Court arise out of the workplace. There is no equivalent to the Norris-LaGuardia Act or the National Labor Relations Act in the consumer or commercial setting. The employment relationship has long been a subject of public and legislative concern going

back well over a century including the right of employees to act in concert to secure rights and benefits. John R. Commons & John B. Andrews, PRINCIPLES OF LABOR LEGISLATION (1916).

Whence the question: Does the National Labor Relations Act and the Norris-LaGuardia Act it builds upon allow employers to atomize their workers, to forbid them from seeking the protections of employment law by acting in concert to remedy claimed workplace violations in the only adjudicative forum available to them? The answer necessarily draws on the text, history, and policy of these laws, but it cannot be fully addressed without answering the implicit underlying question: why would an employer impose a restriction disallowing even two coworkers suffering the same wrong from presenting a common claim together?

Two reasons emerge straightaway: one stated, one not. The stated reason is that the benefits to employers and employees of access to a process at once informal, flexible, simple, and expeditious would be lost were more than a single employee to be allowed to proceed to arbitration. As *amicus* Academy has shown, that reason is negated by more than a half century's experience in labor arbitration. For all practical purposes, the two – collective labor arbitration and collective individual arbitration – are identical in terms of informality, simplicity, flexibility and expedition.

The second, albeit unstated reason is that a prohibition on the making of common cause works systematically to abet the avoidance of legal accountability.

Note that the preclusion of collective claims means that numerous employees suffering a common wrong could well bring as many separate claims individually. Should that possibility mature, the employer could face a morass of repetitive proceedings. Consequently, the employer's decision to prohibit group or joint claims is necessarily premised on an assumption that such a multiplicity of separate arbitrations over the same alleged wrong will rarely if ever be brought. In other words, that the employer's risk of facing a "procedural morass" is a risk it is willing to take.

Were the Court to find the preclusion of collective actions to be unlawful as a matter of labor law, one of three results would obtain. Employers could continue to insist on bilateral arbitration, but only for individual claims. In that case, collective claims would be heard in court. Alternatively, employer policy could provide for Rule 23-like arbitration procedures. In fact, such voluntary provision is contemplated by the rules of the major arbitration providers.[16] Or, the employer could simply excise the preclusion of collective claims. This would allow claims to be heard in arbitration on behalf of those who choose to be represented in concert. If the Nation's experience with labor arbitration is a

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[16] Am. Arb. Ass'n, Supplementary Rules for Class Arbitrations (Jan. 1, 2010); JAMS, Class Action Procedures (May 1, 2009).

sound guide – and it is – that result would entail no loss of informality, flexibility, simplicity, or expedition.

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